

Notice  
Of Rulemaking Hearing  
Tennessee Ethics Commission  
Chapter 0580-1-2  
Access to Public Records of the Tennessee Ethics Commission

The Tennessee Ethics Commission will hold a public hearing to receive comments concerning new rules, pursuant to T.C.A. § 3-6-107(1). This hearing will be conducted as prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-201 et seq., and will take place in the State Library and Archives Building, Capitol Blvd., Nashville, Tennessee, at \_\_\_\_\_ CDT on August \_\_\_\_\_, 2007.

Written comments will be considered if received by close of business, August \_\_\_\_\_, 2007, at the office of the Tennessee Ethics Commission, 201 4<sup>th</sup> Ave. N, Suite 1820, Nashville, TN 37248; 615-253-8634.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Tennessee Ethics Commission, 201 4<sup>th</sup> Ave. N, Suite 1820, Nashville, TN 37248, 615-253-8634, to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, by telephone, or other means, and should be made no less than ten (10) days prior to August \_\_\_\_\_, 2007 or the date such party intends to review such filings, to allow time to provide such aid or service. Hearing impaired callers may use the Tennessee Relay Service (1-800-848-0298).

Complete copies of the text of the notice may be downloaded from the web at <http://state.tn.us/sos/tec/index.htm>, or may be obtained by contacting Anne F. Turner, Tennessee Ethics Commission, 615-253-2665, 201 4<sup>th</sup> Ave. N, Suite 1820, Nashville, TN 37248.

Substance of Proposed Rules  
Of  
The Tennessee Ethics Commission

Chapter 0580-1-2  
Access To Public Records Of The Tennessee Ethics Commission

New Rules

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*The Attorney General's office has reviewed these proposed rules and has raised concerns about several specific rules. Within the body of these rules the Attorney General's concern has been noted, an explanation of the rule as originally proposed has been provided, and a recommendation of specific language for allaying the concern has been made.*

**0580-1-2-.01 PURPOSE AND SCOPE.**

These rules are promulgated for the purpose of providing procedures to allow access to those records which are within the custody and control of the Tennessee Ethics Commission, and that are within the definition of public records in the Tennessee Public Records Act, T.C.A. §§ 10-7-501, et seq.; and are not within any exception, privilege, court decision, statute, common law principle, or other provision of law that excludes the public record from being available for

inspection and copying by members of the public. All records of the Tennessee Ethics Commission are currently housed at the main office of the Commission. These rules are also promulgated for the purpose of implementing and establishing fees to be charged for reproduction of records or for the development of records in a specific format.

**Authority:** T.C.A. § §4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506, *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and *Op. Tenn. Atty. Gen. 01-021* (Feb. 8, 2001).

## 0580-1-2-.02 DEFINITIONS.

- (1) Act. The Tennessee Public Records Act, T.C.A. §§ 10-7-501, et seq.
- (2) Commission. The Tennessee Ethics Commission.
- (3) Executive Director. The Executive Director of the Tennessee Ethics Commission.
- (4) Non-routine Copy. A copy, whether of paper or of electronically stored data, which, to be made, requires more than minimal staff assistance, e.g., odd or oversize pages, bound documents which must be disassembled before copying and reassembled after copying, an unusually large number of copies, or manipulation or retrieval of electronically stored data.
- (5) Public Record. For purposes of this Chapter, any Record of the Commission that is within the definition of public records in T.C.A. § 10-7-503(a), with the proviso that a document that is a public record as defined by the Act may be within an exception otherwise provided by law pursuant to T.C.A. § 10-7-503(a), and therefore may not be subject to inspection or copying.

*Concern:* The preceding definition specifically references T.C.A. § 10-7-503(a) as containing a “definition of public records”, which is not technically correct. In addition, the specific reference to 10-7-503(a) is inconsistent with the general reference to “the Act”. Finally, it is recommended that the phrase “otherwise provided by law pursuant to” be changed to “otherwise provided by state law pursuant to”.

*Recommendation:* The rule as originally proposed stated:

For purposes of this Chapter, any record of the Commission that is deemed to be open to inspection by the public pursuant to the provisions of the Tennessee Public Records Act, T.C.A. §§ 10-7-501 et seq., and pursuant to court order and case law interpreting the Act. {the definition was then followed by a listing of specific exceptions recognized by state law}.

*The list of specific exceptions raised a public concern that the Commission would attempt to create exceptions and deny access to its records. It was therefore recommended that the exception language be changed from a list to the following:*

that is not within any exception, privilege or other provision of law that excludes the record from being available for inspection and copying by members of the public

*It is therefore recommended that the definition be written as follows:*

**For purposes of this Chapter, any record of the Commission that is deemed to be open to inspection by the public pursuant to the provisions of the Tennessee Public Records Act, T.C.A. §§ 10-7-501 et seq., and pursuant to court order and case law interpreting the Act, with the proviso that a document may be within an exception otherwise provided by state law pursuant to T.C.A. § 10-7-503(a), and therefore may not be subject to inspection or copying.**

- (6) Record. For the purposes of this Chapter, any data and/or documents developed and maintained by the Commission (whether on paper, magnetically, or electronically, whether on a single computer or on a computer system, whether on disk, tape or otherwise), or that have been received and are maintained by the Commission, during the normal course of the Commission’s activities. A Record may or may not be a Public Record. Records of the Commission are retained, transferred or destroyed in accordance with state record retention laws.

- (7) Routine Copy. A copy, whether of paper or of electronically stored data, which, to be made, requires minimal staff assistance, e.g., pages which are either 8½ x 11 or 8½ x 14 and can be automatically printed from electronically stored records or automatically fed into a standard copier. Any copies of Public Records, even if stored electronically or magnetically, shall not be deemed Routine Copies if it is necessary to print the copies of the Public Records by means of a separate screen-print for each individual page of the Record.

*Authority:* T.C.A. § §4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506, *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and *Op. Tenn. Atty. Gen. 01-021* (Feb. 8, 2001).

### **0580-1-2-.03 REQUESTS FOR INSPECTION, OR INSPECTION AND REPRODUCTION, OF PUBLIC RECORDS.**

*Concern:* The repeating of the word “inspection” in the title is unnecessarily duplicative.

*Recommendation:* The rule as proposed stated: “Requests For Access To Or Reproduction Of Public Records”. It is therefore recommended that the title be changed as follows:

### **REQUESTS FOR INSPECTION OR REPRODUCTION OF PUBLIC RECORDS**

- (1) A request to the Commission for inspection or reproduction of Public Records may be made in person, via telephone, via e-mail, postal mail, or facsimile transmission; provided, however, that a request by telephone must be followed by a written request. The request shall identify with reasonable specificity the Public Record, set or system of Public Records which is being requested.
- (2) Before providing inspection, or inspection and reproduction, of the requested Record, Commission staff shall review the requested Record or Records as quickly as reasonably possible, consistent with the availability of appropriate staff and with regard to the scope of the Records request, determine whether the Record appears to be a Public Record and, if so, assess the status of the Public Records and the scope of the request.
- (3) Upon review and prior to the release of the requested Public Record, the Commission’s staff may redact any such data or information in the Public Record that contains confidential, privileged or otherwise protected materials, as such protected materials are referred to in T.C.A. § 10-7-503(a), incorporating other provisions of law, and which are not to be inspected or reproduced.

*Concern:* The specific reference to 10-7-503(a) is too narrow, as this particular section does not specifically mandate the redaction of protected materials; rather, review and redaction is contained within the provisions of the Act as a whole and the case law interpreting it.

*Recommendation:* The original proposed rule stated:

Upon review, Commission staff may redact any such data or information prior to release of the record, or portion of the record, that it has reason to believe has or may have confidential, privileged or otherwise protected material in the record that is subject to the Tennessee Public Records Act.

*The Attorney General has suggested specific language. It is recommended that the Attorney General’s language be used as follows:*

**Upon review and prior to the release of the requested Public Record, the Commission’s staff may redact any data or information in the Public Record that is confidential, privileged or otherwise protected from disclosure by state law.**

- (4) If it appears from the Commission staff’s review and assessment that the requested Record is a Public Record and inspection and/or reproduction of the Public Record is permissible and is not protected, but that inspection and/or reproduction of the Public Record, or the system of Public Records, cannot immediately be provided, then the Commission staff shall so inform the individual or entity making the request. The Commission staff shall provide a reasonable estimate of the time that will be required to comply with the request and an explanation of why the Public Record is not immediately available.

- (5) Denial of Request to Inspect, or Inspect and Reproduce, Requested Record. If it appears from the Commission staff's review and assessment that the requested Record either is not a Public Record, or is not subject to inspection or reproduction pursuant to state or federal law, Commission staff shall provide notice to the requesting individual or entity, stating the legal basis for the denial. Upon receiving such notice, the requesting individual or entity may submit to the Commission a written request to review the Commission staff's denial of the request. The Commission shall review such request in consultation with the Office of the Attorney General & Reporter, and shall provide written notice to the requesting individual or entity upholding, modifying or overturning the Commission staff's denial of the request.

*Concern: The Attorney General is not comfortable with a rule requiring staff to consult with the Attorney General, as it could be construed to require their office to engage in a particular action. In addition, the Attorney General is concerned that the highlighted language creates an administrative review process which may not be authorized by the Public Records Act, and which is not anticipated by the Act. Instead, the Act provides that an agency review and redact materials, and, if the request is denied, the Act then contemplates and provides for prompt judicial review of that decision.*

*Recommendation: The rule as originally proposed did not contain the highlighted language. It is recommended that this section be deleted in its entirety and the Commission can informally provide individuals with an opportunity for the Commission to review the staff's decision if the individual chooses to do so before seeking judicial review. If, instead, the Commission would still prefer to have a provision for review added to the rule, the following language is recommended:*

**Denial of Request to Inspect or Reproduce Requested Record. If it appears from the Commission staff's review and assessment that the requested Record either is not a Public Record, or is not subject to inspection or reproduction pursuant to state or federal law, Commission staff shall provide notice to the requesting individual or entity, stating the legal basis for the denial. Upon receiving such notice, the requestor may ask that the Commission review the Commission staff's denial of the request; provided, however, such review is not in lieu of the requestor's right under T.C.A. § 10-7-505 to obtain judicial review of the denial of the request.**

**Authority:** T.C.A. §§ 4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506; *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and *Op. Tenn. Atty. Gen. 01-021* (Feb. 8, 2001).

#### **0580-1-2-.04 FEES AND COSTS FOR REPRODUCTION OF PUBLIC RECORDS.**

- (1) Fees and costs for the reproduction of Public Records are as follows; provided, however, that if a contractor, consultant or specialist is used to fulfill the reproduction request, then the fee charged shall be the actual costs related to reproduction of the Public Record which were invoiced to the Commission:

	Service	Fee
(a)	Routine Copies on paper	\$0.25 per one-sided copy \$0.30 per two-sided copy
(b)	Non-Routine Copies on paper	\$0.50 per one-sided copy \$0.60 per two-sided copy
(c)	Copies on CD-Rom	\$5.00 per disk
(d)	E-mail of electronic files which do not require special computer programming time as set forth in paragraphs (g) and (h) below	No Charge
(e)	Postal mail of paper files	Actual postage fees incurred by Commission
(f)	Facsimile Transmission	No Charge, 10 or fewer pages; \$5.00 for every 10 pages thereafter

- (g) Computer programming time, when necessary to place the Public Records in a readable and reproducible format or in a specific reproducible format that is requested by the individual or entity seeking copies of the Public Record, in addition to the copy costs described in paragraphs (a) through (c), above. \$18.00 per half hour, with minimum charge of \$108.00
  - (h) Staff Time. If the Executive Director determines that the staff time necessary to reproduce the Public Records, or to supervise the reproduction of Public Records as set forth in Paragraph (2), below, exceeds the reasonable period of staff time which would typically be devoted to responding to a request for reproductions of Public Records, the Executive Director shall so notify the requesting individual or entity and shall provide the requesting individual or entity an estimate of the anticipated staff costs associated with the requested reproduction. Such costs shall be computed using the staff position's hourly wage as determined by the Fiscal Division of the Office of the Secretary of State.
  - (i) Before the Commission makes copies of Public Records, or before the Commission develops a specific format for the reproduction of Public Records, the requesting individual or entity must make payment in full to the Commission. Payment shall be made by cashier's check or money order made payable to the Tennessee Ethics Commission, and be delivered to the Commission's office; provided, however, that amounts equal to or less than Ten Dollars (\$10.00) may be paid in cash; provided further that, notwithstanding the fee schedule set forth in this section, the Executive Director may, in his or her discretion, waive payment if the total costs of reproduction are less than one dollar (\$1.00).
- (2) Copying by Requesting Individual or Entity.
- (a) All Public Records shall remain in the sole custody of Commission staff. No original Public Records shall be placed in the custody of the individual or entity making the request.
  - (b) The Executive Director may, in his or her discretion, permit the individual or entity requesting the Public Record(s) to supply the necessary equipment and supplies to make the requested copies where the Public Records are housed or located for purposes of the records request.
  - (c) The Executive Director may, in his or her discretion, require that Commission staff observe the reviewing and copying process permitted by this paragraph for the purpose of protecting the integrity of the Public Records, and any costs associated therewith may be charged pursuant to these rules.

**Authority:** T.C.A. §§ 4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506; *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and *Op. Tenn. Atty. Gen. 01-021* (Feb. 8, 2001).

Legal contact and/or party who will approve final copy for publication:

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Nashville, TN 37219  
(615) 253-8634

Signature of the agency officer or officers directly responsible for proposing and/or drafting these rules:

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Anne F. Turner, General Counsel

The roll-call vote by the Tennessee Ethics Commission on these rulemaking hearing rules was as follows:

	Aye	No	Absent
Thomas J. Garland (Chairman)	<u>_X_</u>	_____	_____
R. Larry Brown	<u>_X_</u>	_____	_____
Donald J. Hall	<u>_X_</u>	_____	_____
Linda W. Knight	<u>_X_</u>	_____	_____
Dianne Neal	<u>_X_</u>	_____	_____
Benjamin S. Purser, Jr.	<u>_X_</u>	_____	_____

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Ethics Commission on the \_\_\_\_ day of \_\_\_\_\_ 2007.

Further, I certify that the provisions of T.C.A. §4-5-222 have been fully complied with, that these rules are properly presented for filing, a notice of rulemaking hearing has been filed in the Department of State on the \_\_\_\_\_, 2007 and such notice of rulemaking hearing having been published in the \_\_\_\_\_, 2007\_ issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on the \_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Bruce A. Androphy, Executive Director

Subscribed and sworn to before me this the \_\_\_\_ day of \_\_\_\_\_ 2007.

\_\_\_\_\_  
Notary Public

My commission expires on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

\_\_\_\_\_  
Robert E. Cooper, Jr.  
Attorney General & Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of state on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ and will become effective on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Riley C. Darnell  
Secretary of State

By: \_\_\_\_\_